No. 89-947

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

J. JOSEPH CURRAN, JR.,
ATTORNEY GENERAL OF MARYLAND, *et al.*,
Petitioners,

v.

ALFRED MULLER, M.D., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

RALPH S. TYLER, III*
CAROLYN A. QUATTROCKI
ANDREW H. BAIDA
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(301) 576-6342

Attorneys for Petitioner
J. Joseph Curran, Jr.,
Attorney General of Maryland

CLYDE H. SORRELL
County Attorney for
Montgomery County

A. KATHERINE HART
Assistant County Attorney
101 Monroe Street
Rockville, Maryland 20850
(301) 217-2600

Attorneys for Petitioner
Montgomery County Council

JOHN B. WALSH, JR.
CHEN, WALSH & TECLER
200A Monroe Street, Suite 300
Rockville, Maryland 20850
(301) 279-9500

Attorney for Petitioners
Friendship Properties and
The Barlow Corporation

* *Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

To incorporate a municipality in Maryland, the first step requires that a petition be submitted to the county council. That petition must be signed by 20% of the registered voters and by the owners of 25% of the assessed value of the property in the area proposed for incorporation. This case presents the following question:

Does strict scrutiny equal protection analysis apply to a state municipal incorporation statute which requires that property owners participate in the initial petitioning stage of a multi-step process which may, but need not, result in an election?

PARTIES TO PROCEEDINGS BELOW

The parties are J. Joseph Curran, Jr., the Attorney General of Maryland, the Montgomery County Council, Friendship Properties, The Barlow Corporation (appellees below and petitioners here); and Alfred Muller, M.D. and the Friendship Heights Village Council (appellants below and respondents here).

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek this Court's review of the judgment of the United States Court of Appeals for the Fourth Circuit which declared Maryland's municipal incorporation statute (Md. Ann. Code Art. 23A, §21) unconstitutional.

OPINIONS BELOW

The November 13, 1989 Opinion of the Court of Appeals for the Fourth Circuit will be reported at 889 F.2d 54, and is reprinted in the appendix to this petition ("App.") at App. 1a-7a. The July 8, 1988

Opinion of the United States District Court for the District of Maryland is unreported and is reprinted at App. 8a-15a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1989. Pursuant to 28 U.S.C. §§1254(1) and 2101(c), this Court has jurisdiction to review that judgment.

STATUTORY PROVISION INVOLVED

Md. Ann. Code Art. 23A, §21 (1987 Repl. Vol.) (1989 Cum. Supp.) (reprinted in Appendix C at 16a-17a).

STATEMENT OF THE CASE

I. THE STATUTORY SCHEME

Under Maryland law, the exclusive method to establish a municipal corporation in an area in which 300 or more persons reside is set forth in Art. 23A, §§20-28, Md. Ann. Code (1987 Repl. Vol.). The first step in this multi-step process is the submission of a petition to the county governing board signed by 20% of the registered voters in the area proposed for incorporation, *and* by the owners of 25% of the assessed value of the real property in the area. *See* Art. 23A, §21 ("§21") (App. at 16a-17a). Plaintiffs have been unable to satisfy the latter of these requirements. When a valid petition is submitted, the county council then decides whether to hold an election on the question of incorporation. The county council's decision is entirely discretionary; the council is not bound by the petition; and its decision is not subject

to judicial review. If the county council decides not to hold an election, that concludes the process.

If the county council decides to hold an election, the third and final step is an election held within 60 days of that decision. In such an election, all registered voters in the area proposed for incorporation may vote; no preference or added weight is given to the votes of property owners; and non-natural (*e.g.*, corporate) and non-resident property owners do not participate at all. *See* §21.

II. STATEMENT OF FACTS

Friendship Heights and the Hills ("Friendship Heights") is located in Montgomery County, Maryland, lying north of the boundary line between the District of Columbia and Montgomery County. Montgomery County is a "home rule" county and it exercises local governmental powers over the geographic area of Friendship Heights. Over the past few years, the Friendship Heights Village Council has sought to become an independent municipal corporation. It has been unsuccessful, however, in satisfying the petition requirements of Maryland's municipal incorporation law, §21, and it has been equally unsuccessful in persuading the Maryland General Assembly to change those requirements.

The Village Council and Alfred Muller, M.D., a resident of Friendship Heights and the Chairman of the Village Council, filed this action in federal district court against J. Joseph Curran, Jr., the Attorney General of Maryland, and the Montgomery County Council, the legislative branch of the Montgomery County government, challenging the requirement in §21 that a petition be signed by the owners of 25%

of the assessed value of the property in the area proposed for incorporation. Friendship Properties and The Barlow Corporation, two landowners in the potentially incorporated area, intervened as defendants.

III. DECISIONS BELOW

The United States District Court for the District of Maryland (Ramsey, J.) rejected plaintiffs' Fourteenth Amendment equal protection challenge to §21's 25% property-owner requirement, holding that "participation in a petitioning process is not tantamount to voting." (App. at 12a.) Thus, because §21 grants landowners no preference in voting, but distinct participation only at the pre-election petitioning stage, the court found that the "statute is not subject to strict scrutiny" analysis and must be upheld as "long as it has some rational basis." (App. at 13a.) Section 21 plainly satisfies the rational basis standard, a fact not seriously disputed by plaintiffs, as "incorporation constitutes a substantial change in an area's form of government, a change that might result in increased development for the area, higher real estate taxes, or diminished public services. . . ." (App. at 13a.)

On plaintiffs' appeal, a panel of the Fourth Circuit reversed, holding that the 25% property-owner requirement unconstitutionally "blocks" the holding of an election because the county council cannot decide to hold an election without a petition joined by the property owners. (App. at 5a.) Because the Fourth Circuit also held that the unconstitutional provision of §21 was not severable, it invalidated the entire

statutory scheme and left Maryland without any means to incorporate new municipalities. (App. at 7a.)[1]

REASONS FOR GRANTING REVIEW

SUMMARY

This case warrants review because this Court has never addressed the question of whether the strict equal protection standard of review applicable to voting also applies to pre-election petitioning. However, subjecting §21's petition requirement to the "compelling state interest" test simply cannot be reconciled with the long-established principle that states possess the broadest discretion in deciding how their units of local government are established and organized. *See, e.g., Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

Further, the Fourth Circuit's decision should be reviewed because it is in conflict with the reasoning, if not the direct holdings, of the Tenth Circuit in *Montero v. Meyer*, 861 F.2d 603 (1988), *cert. denied*, 109 S.Ct. 3249 (1989), and the Eleventh Circuit in *Delgado v. Smith*, 861 F.2d 1489 (1988), *cert. denied*, 109 S.Ct.

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[1] The Fourth Circuit issued its initial decision in this case on June 2, 1989. The court then held that §21's 25% property-owner provision was unconstitutional and was not severable from the rest of the statute. Plaintiffs petitioned for rehearing on the issue of severability as they recognized correctly that their "victory" meant that Maryland no longer had any means for them to pursue their goal to incorporate Friendship Heights. The Fourth Circuit granted rehearing, and following further briefing and oral argument, the court issued its decision of November 13, 1989. (App. at 1a-7a.) With some minor stylistic changes, that decision is the same as the court's earlier decision.

3242 (1989). In both *Montero* and *Delgado*, the issue was whether the Voting Rights Act applied to a pre-election petition stage. Contrary to the Fourth Circuit here, the *Montero* and *Delgado* courts held that pre-election petitioning does not implicate the right to vote even though an election would be held upon the successful completion of the petitioning stage. Voting and petitioning are simply too central to our national political life for this Court not to resolve this irreconcilable conflict between the circuits on the question of whether the strict requirements applicable to voting attach to a pre-electoral stage.

I. THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION OF WHETHER STRICT SCRUTINY EQUAL PROTECTION ANALYSIS APPLIES TO A STATE MUNICIPAL INCORPORATION STATUTE SIMPLY BECAUSE AN ELECTION MAY OCCUR AS THE FINAL STEP TOWARDS INCORPORATION.

This case presents "an important question of federal [constitutional] law which has not been, but should be, settled by this Court. . . ." Sup. Ct. R. 17.1(c). That question is whether the strictest, and thus almost inevitably fatal, standard of equal protection review applies to a provision of a state municipal incorporation statute simply because compliance with that provision may (but need not) result in the holding of an election. By extending the concept of "the right to vote" to a plainly pre-election stage, the court below applied the wrong standard of equal protection review to invalidate Maryland's law for establishing municipal corporations.

When state law regarding local government matters is challenged on federal constitutional grounds, the proper inquiry "is limited to the question whether any

state of facts reasonably may be conceived to justify [it]. . . ." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 74 (1978) (quotation and citation omitted). The state "has vast leeway in the management of its internal affairs," *Sailors v. Board of Education*, 387 U.S. 105, 109 (1967), because of the need for "innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions." *Id.* at 110-111. Absent an invidious impact, *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the constitution grants no rights "concerning the *procedure* for creating or altering any type of state district." *Detroit Edison Co. v. East China School District No. 3*, 378 F.2d 225, 229 (6th Cir.), *cert. denied*, 389 U.S. 932 (1967) (emphasis in original).

What the constitution guarantees is the right to "one person, one vote," *Reynolds v. Sims*, 377 U.S. 533 (1964), the right to vote without regard to one's financial status, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and the right to have one's vote counted without regard to wealth or property ownership, *Hill v. Stone*, 421 U.S. 289 (1975). Those principles, however, are in no sense implicated, let alone violated, by §21's 25% property-owner petitioning requirement. Plaintiffs have never claimed that the Maryland Legislature which enacted §21 (and which has repeatedly rejected plaintiffs' urgings to change it) was not constitutionally representative. Further, if, after successful completion of the petitioning stage, the county council, also a constitutionally representative body, decides to hold an election on the question of incorporation, then each person gets

one vote; there is no "property-owner poll tax"; and all votes are of equal weight. *See* §21.[2]

The Fourth Circuit's decision truly constitutes an inappropriate federal judicial policy judgment on the wisdom of Maryland's system for establishing new municipal corporations. The court below believed it unwise for Maryland to have a system which apparently has permitted property owners to "block" plaintiffs' petition to the Montgomery County Council. Unwise it may be, but that does not make it unconstitutional because there is no "burden" on plaintiffs' right to vote as the property-owner requirement "burdens" only the petitioning stage and expires long before plaintiffs have a right to vote. Because strict scrutiny almost inevitably dooms a state statute, that standard of review should be used sparingly and reserved only for statutes which actually, not simply theoretically, deny the right to vote.

The provision invalidated by the Fourth Circuit is not uncommon. Maryland's municipal annexation statute, for example, has a virtually identical provision, Md. Ann. Code, Art. 23A, §19(b) and (c) (1987 Repl. Vol.), and at least seven (7) other states (Alabama, Colorado, Michigan, North Dakota, Tennessee, West Virginia, and Wisconsin) have statutes which require that a petition signed by a percentage of property owners be filed before an election is held on the issue

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[2] Similarly inapplicable is the principle that a land-ownership requirement for appointment or election to a governmental body exercising general governmental powers violates equal protection. *See Quinn v. Millsap*, 109 S.Ct. 2324 (1989); *Turner v. Fouche*, 396 U.S. 346 (1970). Neither the Maryland General Assembly nor the Montgomery County Council has any such restrictions, and again plaintiffs have never claimed to the contrary.

of incorporation.[3] Thus, the potential impact of the decision below extends far beyond invalidating Maryland's statute for incorporating municipalities.

The error in the Fourth Circuit's decision is its failure to strip plaintiffs' challenge "of its voting rights attire." *See Holt Civic Club*, 439 U.S. at 70. The court below failed to distinguish between the right to vote (when strict scrutiny review applies) and a preceding non-electoral stage (when highly deferential review applies). That error should be reviewed.

II. THE DECISION BELOW CONFLICTS WITH TWO RECENT DECISIONS IN OTHER CIRCUITS WHICH HOLD THAT PETITIONING DOES NOT IMPLICATE THE RIGHT TO VOTE.

A further reason for granting review here is that the Fourth Circuit's holding is in direct conflict with recent decisions of the Tenth and Eleventh Circuits

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[3] Ala. Code §§11-41-1, *et seq.* (1989 Repl. Vol.); Colo. Rev. Stat. §§31-2-101, *et seq.* (1986 and 1988 Supp.); Mich. Comp. Laws Ann. §§123.1007, *et seq.* (West 1989 Supp.); N.D. Cent. Code §§40-02-01, *et seq.* (1983 and 1989 Supp.); Tenn. Code Ann. §§6-1-202, *et seq.* (1985); W.Va. Code §§8-2-1, *et seq.* (1984); Wis. Stat. Ann. §§66.012, *et seq.* (West 1985 and 1989 Supp.). *See also* Cal. Gov't Code §§56750, *et seq.* (Supp. 1989) (no election on incorporation issue unless incorporation petition is first signed either by 25% of registered voters or 25% of property owners of 25% of assessed value of land within territory proposed to be incorporated); N.M. Stat. Ann. §§3-2-1, *et seq.* (1987) (no election unless incorporation petition is signed by either 200 "qualified electors" or the owners of not less than 60% of the real estate within proposed incorporated area); N.Y. Village Law §§2-200 *et seq.* (McKinney 1973) (requires signatures of either 20% of resident voters or owners of more than 50% in assessed valuation of real property).

holding that pre-election petition procedures do not implicate, and are not part of, the voting process.

In *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 3242 (1989), the Eleventh Circuit held that the Voting Rights Act of 1965, 42 U.S.C. §§1971, *et seq.*, which is "to be given 'the broadest possible scope' ", 861 F.2d at 1492, *quoting Allen v. State Board of Elections*, 393 U.S. 544, 567 (1969), does not apply to the circulation of pre-election initiative petitions written only in English. Notwithstanding that the Voting Rights Act requires the states that it affects to provide "materials or information *relating to the electoral process* . . . in the language of the applicable minority group as well as in the English language", 42 U.S.C. §1973aa-1a(c) (emphasis added), the court held that "the petition procedure merely comprises the first step in a process which might ultimately result in an election. It does not implicate the voting process itself." 861 F.2d at 1497.

To the same effect is the Tenth Circuit which has held that the Voting Rights Act does not apply to initiative petitions written in English only because "[i]mplicit in both the statutory and the common definitions of the concept of voting is the presence of a choice to be made . . . [A]pplying the concept of voting to a process which provides no choice defies the commonly accepted usage of the term." *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 3249 (1989).[4]

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[4] Also contrary to the decision below are two federal district court decisions holding that the right to vote is not implicated at the pre-election petitioning stage. *See Zaldivar v. City of Los*

The pre-election petitioning procedures upheld in *Delgado* and *Montero* "relat[e] to the electoral process" to the same extent as the petition procedure invalidated here. If a pre-election petition "does not implicate the voting process" for purposes of the Voting Rights Act (notwithstanding its broad remedial purposes), then plainly it does not for purposes of the Fourteenth Amendment. *See Allen*, 393 U.S. at 565-66 (the Voting Rights Act "gives a broad interpretation to the right to vote").[5] Clearly, therefore, *Delgado* and *Montero* conflict directly with the rationale of the holding below that §21's petitioning process is unconstitutional because "an election is involved." (App. at 5a.)[6]

The Fourth Circuit made no effort to reconcile its decision with the holdings of the Tenth and Eleventh Circuits, notwithstanding the fact that those courts squarely rejected the precise rationale of the Fourth Circuit's decision in this case—that voting principles

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Angeles, 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*, 780 F.2d 823 (9th Cir. 1986); *Gerena-Valentin v. Koch*, 523 F.Supp. 176 (S.D. N.Y. 1981).

[5] The applicability of these Voting Rights Act cases to the present Fourteenth Amendment challenge is confirmed by this Court's decision in *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 126-27 (1978), where the Court noted that the Act "is designed to implement the Fifteenth Amendment, and, in some respects, the Fourteenth Amendment." (Citations omitted).

[6] Further, the Fourth Circuit's decision is inconsistent with the rule that that when, as here, the incorporation or annexation decision depends upon the intervening actions of a deliberative body, then the Fourteenth Amendment is not even implicated by petitions which pre-date such actions. *See, e.g., Carlyn v. City of Akron*, 726 F.2d 287, 290 (6th Cir. 1984).

apply to a pre-voting petitioning stage because an election may follow.[7] This Court should resolve this conflict.

CONCLUSION

For the reasons stated, the Court should grant the writ and review the judgment of the Fourth Circuit. Following review, that judgment should be reversed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

RALPH S. TYLER, III*
CAROLYN A. QUATTROCKI
ANDREW H. BAIDA
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(301) 576-6342

Attorneys for Petitioner
J. Joseph Curran, Jr.,
Attorney General of Maryland

CLYDE H. SORRELL
County Attorney for
Montgomery County

A. KATHERINE HART
Assistant County Attorney
101 Monroe Street
Rockville, Maryland 20850
(301) 217-2600

Attorneys for Petitioner
Montgomery County Council

JOHN B. WALSH, JR.
CHEN, WALSH & TECLER
200A Monroe Street, Suite 300
Rockville, Maryland 20850
(301) 279-9500

Attorney for Petitioners
Friendship Properties and
The Barlow Corporation

* *Counsel of Record*

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[7] *Montero* and *Delgado* were relied upon heavily by defendants/appellees (now petitioners) in their brief in the Fourth Circuit.

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2896

ALFRED MULLER, M.D.; FRIENDSHIP HEIGHTS VILLAGE COUNCIL
Plaintiffs - Appellants

v.

J. JOSEPH CURRAN, JR., ATTORNEY GENERAL; MONTGOMERY COUNTY COUNCIL; FRIENDSHIP PROPERTIES; THE BARLOW CORPORATION
Defendants - Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (C/A-87-1316-R)

Argued: October 2, 1989 Decided: November 13, 1989

Before SPROUSE, Circuit Judge, BUTZNER, Senior Circuit Judge, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Stephen McKenzie Truitt (Susan L. Launer, Daniel I. Prywes, PEPPER, HAMILTON & SCHEETZ on brief) for Appellants.
Ralph S. Tyler, Assistant Attorney General; Angela Katherine Hart, Assistant County Attorney (J. Joseph Curran, Jr., Attorney General; Carolyn A. Quattrocki, Assistant Attorney General; Omar Melehy, Assistant Attorney General; Clyde H. Sorrell, County Attorney; John B. Walsh, Jr., CHEN, WALSH & TECLER on brief) for Appellees.

KAUFMAN, Senior District Judge.

The questions presented in this appeal are whether a Maryland statute relating to incorporation of an unincorporated area violates the fourteenth amendment to the United States Constitution and, if so, whether the challenged portion of the statute should be severed, with the rest of the statute left intact.[1] Plaintiff-appellants seek a declaratory judgment holding the offending section of the Maryland statute unconstitutional. However, they also maintain that the remainder of the statutory scheme should survive under principles of severability. The District Court rejected appellants' constitutional challenge and their quest for declaratory relief, and did not reach the severability issue.

Equal Protection

Under Maryland law the only way in which an unincorporated area of three hundred or more residents can

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[1] Appellants—plaintiffs below—are the Village Council in the area in Montgomery County, Maryland and also a registered voter in that area. The standing of the latter is not questioned. The standing of the Village Council, a Special Tax District in Montgomery County, is challenged on the grounds that it is not a natural person and has no right to vote. In view of the standing of one of the party plaintiffs, the issue of standing of the Village Council need not be reached by this Court. *Carey v. Population Services International*, 431 U.S. 678, 682 (1977).

become a municipality is pursuant to the three-step process set forth in Md. Ann. Code art. 23A, §§ 20-30 (1981 Repl. Vol.). The first step requires a petition to the county council signed by at least 20% of the registered voters of the area to be incorporated and also by the owners of at least 25% of the assessed value of the real property within that area. The second step involves a decision by the county council, in its sole discretion, to submit the issue of incorporation to the voters of the area. The third step is an election in which all registered voters in the area can vote.

In *Hayward v. Clay*, 573 F.2d 187 (4th Cir.), *cert. denied*, 439 U.S. 959 (1978), this Court held invalid a South Carolina statutory provision which provided a two-step process for annexation of an area: (1) a petition signed by 15% of the property owners in the area involved; (2) the favorable vote of a majority of such property owners and also of the majority of the registered voters in both the annexed and the annexing areas. Noting that "South Carolina need not grant anyone the right to vote on annexation," Judge Butzner wrote that "once the right to vote is established, the equal protection clause [of the fourteenth amendment] requires that, in matters of general interest to the community, restriction of the franchise on grounds other than age, citizenship and residence can be tolerated only upon proof that it furthers a compelling state interest." *Id.* at 190. Judge Butzner held that "[a] change in the entire structure of local government is a matter of general interest," *id.*, and that "while the referendum [of the property owners] in form may be a condition precedent to the actual election, in effect it grants to some individuals—who are identified on the basis of ownership of realty—the right to nullify a vote for annexation by the electorate at large." *Id.* at 189. Judge Butzner concluded that the equal protection clause was offended, relying upon *Hill v. Stone*, 421 U.S. 289 (1975), and noting that although the "mechanics" of the Texas

procedure held unconstitutional in *Hill* differed from the procedure challenged in *Hayward*, it is the "restriction of the effective franchise to a property owning class—not the mechanics of accomplishing the restrictions—that offends the equal protection clause." 573 F.2d at 190. A result similar to that in *Hayward* was reached in *City of Seattle v. State*, 103 Wash. 2d 663, 694 P.2d 641 (1985) (citing with favor to *Hayward* and to *Curtis v. Board of Supervisors of Los Angeles County*, 7 Cal. 3d 942, 501 P.2d 537 (1972)).

In *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978), the Fourth Circuit distinguished *Hayward* in dealing with another South Carolina annexation provision. The statutory procedure challenged in *Berry* authorized the governing body of the annexing area to annex upon the filing of a petition signed by 75% of the property holders in the area to be annexed. Judge Russell, in upholding the challenged statutory provision, wrote: "[T]he important fact is that the action of the freeholders in signing the request for annexation does not authorize annexation. Annexation depends wholly on the favorable vote of the governing body of the annexing city. This is the crucial action and on that neither freeholders nor electors as such have a vote. Since the electors of the municipality of the area to be annexed are not given the right to vote under the challenged statute, the application of the statute poses no equal protection issue." *Id.* at 424. Judge Russell also wrote: "Clearly, if the statute before us had provided that annexation required the favorable vote of the freeholders of the area to be annexed and made no provision for voting by the electors of that area, the statute would be condemned as violative of the equal protection clause. However, that is not the procedure under the statute under review. There is, we repeat, no election either for freeholders or electors and *Heyward* [sic] is not in point." *Id.* at 425. Finally, Judge Russell stated that the challenged procedure "in-

volves no election; in fact, it is a procedure which does not contemplate an election." *Id.*

In the instant case, an election is involved, thus presenting a different question than that in *Berry*. Under the procedure attacked herein, no popular vote is taken unless the county council, in its sole discretion, authorizes the election. However, a vote by the county council can be entirely blocked if the owners of at least 25% of the assessed value of the real property within the area to be incorporated fail to petition in favor of incorporation. Because in no event can any vote take place unless the county council exercises its discretion in favor of permitting a vote, the district court concluded that this case is closer to *Berry* than to *Hayward*. We cannot agree. The challenged Maryland procedure permits a popular vote to be blocked by property owners. That is so because the county council cannot schedule such a vote unless a given percentage of the property owners authorize it. That in and by itself offends equal protection principles unless a compelling state interest is present. No such interest has been shown in this case.

Severability

In *Hayward*, the majority of the panel held severable certain remaining provisions of the South Carolina statute. 573 F.2d 190-91. Subsequently, the Supreme Court of South Carolina held to the contrary. *Fairway Ford, Inc. v. Timmons*, 281 S.C. 57, 314 S.E.2d 322, 324 (1984).

State law—herein, the law of Maryland—governs determination of severability of a state statute. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 376 (1986); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 60 (2d Cir. 1988). Under Maryland law, "[t]he primary focus" is directed toward "legislative intent," that is, "what would have been intent of the legislative body, if it had known

that the statute could be only partially effective." *Turner v. State*, 299 Md. 565, 576, 474 A.2d 1297, 1302 (1984).

There is a presumption in favor of severability under Maryland law[2] and there is a general severability provision in Md. Ann. Code art. 1, § 23 (1987 Repl. Vol.) which applies to all statutes enacted after July 1, 1973. There is also a severability provision in Md. Ann. Code art. 23A, § 5 (1987 Repl. Vol.), enacted in 1951, which applies only to provisions of Article 23A.[3] Once the statutory provision requiring a petition to be signed by the owners of at least 25% of the assessed value of the real property within the area to be incorporated is stricken, nonnatural, including corporate, property owners would play no controlling part in the issue of incorporation. Maryland's legislature did not intend such a result. The original Senate bill, which now appears within Article 23A,[4] did not contain any role for property owners, provided that 10% of the registered voters of the area could commence the process, and re-

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[2] *Ocean City Taxpayers v. Mayor & City Council*, 280 Md. 585, 600, 375 A.2d 541, 550 (1977); *Comptroller v. Armco, Inc.*, 70 Md. App. 403, 415-17, 521 A.2d 785, 791 (1987).

[3] Md. Ann. Code art. 1, § 23 provides:

> The provisions of all statutes enacted after July 1, 1973 are severable unless the statute specifically provides that its provisions are not severable. The finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent.

Md. Ann. Code art. 23A, § 5 provides:

> If any provision of this article, or the applicability thereof to any person or circumstances, is held invalid, the remainder of this article and the applicability thereof to other persons and circumstances shall not be affected thereby.

[4] Enacted in Chapter 423 of the Acts of 1955.

quired the county council to submit the issue of incorporation to the voters of the area. As enacted, the legislation changed that 10% to 20%, added the need for a petition by the owners of 25% of the assessed value of the real property and thus a sharing of control by voters and property owners, and also left it to the discretion of the county council whether or not to submit the matter to the voters. In that context, this Court cannot conclude that Maryland's legislature intended that if the property owners' vote were to be eliminated as unconstitutional, the legislature desired the statute to survive with no controlling participation by the property owners. Accordingly, we hold that the Maryland statutory scheme under review herein, providing for a three-step process for incorporation, may not survive with the elimination of the challenged 25% property owner petition provision.

The judgment below is reversed and the case is remanded for the entry of an appropriate decree in conformance with this opinion.

REVERSED AND
REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL NUMBER R87-1316

ALFRED MULLER, M.D., et al.

v.

J. JOSEPH CURRAN, JR., Attorney General of the State of Maryland, et al.

Baltimore, Maryland
July 8, 1988

The above-entitled case came on for *Hearing* before the Honorable Norman P. Ramsey, at 9:30 a.m.

APPEARANCES

FOR THE PLAINTIFFS:

Susan L. Launer, Esquire

FOR DEFENDANT J. JOSEPH CURRAN, JR.:

Karen Stakem Hornig, Assistant Attorney General
Ralph S. Tyler, Esquire

FOR DEFENDANT MONTGOMERY COUNTY COUNCIL:

A. Katherine Hart, Assistant County Attorney

FOR DEFENDANT FRIENDSHIP PROPERTIES and THE BARLOW CORPORATION

John B. Walsh, Jr., Esquire

REPORTED BY:

Linda R. Prince
Official Court Reporter

BENCH OPINION

THE COURT: All right, ladies and gentlemen. As I indicated, these quasi-political cases do no good to hang on the docket for extended periods of time, and I think they are one area of the law where a prompt decision is extremely important to let parties get on with their litigation if it is adverse to one side or the other and they wish to appeal it; and accordingly I will give you all the benefit of a bench opinion. I will reserve only the right to clean up case cites, things of that sort, but not to change the substance of the opinion. The opinion which I give you is a tentative one only in regard to my right to eliminate inarticulate phrases and to clean up my cites.

Dr. Alfred Muller is a resident of Friendship Heights, a village on the northern outskirts of Washington, D.C., in Montgomery County, Maryland. He is the chairman of the Friendship Heights Village Council, the Village's governing body. Together, Dr. Muller and the Village Council seek a declaratory judgment that Maryland's municipal incorporation statute violates the equal protection clause by infringing the Village residents' fundamental right to vote. Defendants are the Attorney General, J. Joseph Curran, the Montgomery County Council, and Friendship Properties and the Barlow Corporation, two Village land owners.

Today, I have before me cross motions for summary judgment filed by the parties, and they have been fully briefed by both sides, and I use that in the full sense of the term. I have before me at least three inches of briefing in this case. The parties have indicated that there are no material factual disputes which would preclude the entry of summary judgment, and upon a total review of the case I quite agree that is so. The parties have agreed to treat my decision as a final ruling which will permit either side, if either side feels aggrieved by it, to carry it forward for review and consideration by the Court of Appeals to the Fourth Circuit. I have considered the parties' supporting

memoranda and exhibits and their arguments here, and I am now prepared to rule.

In Maryland, under Article 23A of Maryland's Annotated Code, municipal incorporation is a multi-step process that may be initiated by presenting to a County's Board or County Council a petition signed by 20% of the registered voters in a given area *and* the owners of not less than 25% of the assessed value of real property in that area. The petition must include a detailed description of the geographic area to be incorporated and the text of the proposed charter. Upon receipt of such a petition, the Board or County Council must verify that its signers are either registered voters resident in the area or property owners. If the petition complies with these basic statutory requirements, the Board or County Council may, in its discretion, submit the question of incorporation to the voters of the affected area by a referendum. If a majority of voters approves the referendum, the area is incorporated. *See* Md. Ann. Code, art 23A, Section 21 et seq. (1981 Repl. Vol.).

I have referred to the statute as it existed at the time this action was brought because on May 2nd, 1988, this section was amended by the legislature with an effective date of July 1, 1988, which is the traditional effective date of the Maryland laws not made an emergency or not made immediately effective, and that requires the Board or County Council to explain its reasons if it chooses not to hold a referendum election, and to provide for reconsideration procedures. Effective as of July 1, 1988, this amendment obviously has no effect on this suit and I will not consider it.

Here, there is no doubt that plaintiffs have complied with Article 23A to the extent possible. They have drafted a proposed charter for and they have set out the geographical description of the area to be incorporated. They have printed these on a petition for incorporation, and

they have collected the signatures of 27% of the area's voters on the petition. They have been unable to collect more than 16% of the land owners' signatures however, and it is this shortcoming that has prevented them from presenting their petition to the Montgomery County Council, and that has prompted the filing of this suit.

In *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907), the Supreme Court held that states have absolute discretion to decide ". . . [t]he number, nature and duration of the powers conferred upon municipal corporations and the territory over which they shall be exercised . . ." While this broad statement has been modified in the cases which have followed, the basic message has survived. The exercise by a state ". . . of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment only where the exercise involves the infringement of fundamental rights or the creation of suspect classifications." *Baldwin v. City of Winston-Salem, N.C.*, 710 F.2d 132, 135 (4th Cir.) (per curiam), *cert. denied*, 464 U.S. 1012 (1983).

Drawing on these basic underlying principles, plaintiffs claim that the petitioning procedure in Maryland's incorporation statute must be subject to strict scrutiny under the Fourteenth Amendment because it infringes Friendship Heights residents' fundamental right to vote. By requiring the signatures of the owners of 25% of the land by assessed value, the statute permits landowners to block every incorporation effort merely be withholding their signatures from the petition. Plaintiffs claim that this "veto power" impermissibly burdens their voting rights by nullifying their ability to authorize incorporation. I disagree.

The statute's insistence of landowner signatures does not infringe the residents' right to vote because the procedure during which landowner participation is necessary is not an election. It is only a petitioning process and in

this Circuit, the law is well-settled that participation in a petitioning process is not tantamount to voting. *Compare Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978) with *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978). These two cases are discussed and debated thoroughly in the memoranda and briefs filed by the parties.

At issue in *Hayward* was a South Carolina annexation statute that permitted annexation of a particular area if a majority of the property owners in that area and an independent majority of voters in the area approved it. The Court held that the statute violated the equal protection clause because it created ". . . property-based classifications of voters in an election of general interest and empower[ed] those with property to override the votes of those without." *Hayward*, 573 F.2d at 190.

In *Berry*, by contrast, the South Carolina annexation statute at issue provided for landowner participation not at the final-decision stage, but at the petition stage. Upon the filing of a petition signed by 75% of the landowners in the area to be annexed, the statute authorized the governing body of the city requesting annexation to annex the area by appropriate resolution. In denying a challenge by voters in the annexed area, the Court said that landowner participation in the petitioning process did not violate the equal protection clause because petitioning was not the stage at which the ultimate decision on annexation was made. Petitioning was merely a common mechanism for starting the process, and as such, it did not implicate any voting rights. *See Berry*, 588 F.2d 424-25.

Here, the Maryland statute at issue is more like the statute in *Berry* than that in *Hayward*. Though it requires landowners to initiate the process by signing a petition, the ultimate power to authorize incorporation lies with the resident voters in an election in which the non-resident landowners may not vote. At the petitioning stage, however, neither the voters nor the landowners have a right

to authorize incorporation. Petitioning is a distinct process, and as a result, its participation restrictions do not pose equal protection problems.

Having concluded that Maryland's statute is not subject to strict scrutiny, I must defer to it as long as it has some rational basis. Indeed, I think counsel for the plaintiffs concede that there may be a rational basis for the statute, but nevertheless, this is the proposition which is asserted by *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71-75 (1978) (citing *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 732, (1973)). Because incorporation constitutes a substantial change in an area's form of government, a change that might result in increased development for the area, higher real estate taxes, or diminished public services, Maryland's General Assembly sought to have all interested parties permitted to have some say in the process. Requiring incorporation petitions to carry the signatures of a portion of the affected landowners was a rational way to insure them the participation the General Assembly wanted them to have. Accordingly, I must reject plaintiffs' challenge and permit the statute to stand.

As a final matter, I note that in addition to their request for declaratory relief under the Fourteenth Amendment, plaintiffs have also lodged a claim against the County Council under 42 U.S.C. Section 1983 on the theory that had it followed the Maryland statute, the County Council would have violated the residents' right to equal protection. Obviously, my conclusion that the statute does not violate the equal protection clause disposes of this additional claim and, as County Council's attorney has pointed out, the County Council has not acted. The whole thrust of the 1983 suggestion is that something in the future may occasion a denial of civil rights, but there is nothing in this case to indicate a denial of civil rights by the Council; and obviously there would not be any denial of civil rights

since I have found the statute not to be violative of equal protection.

I will, therefore, today enter an order granting the motion of summary judgment of the defendants and denying the like motion of the plaintiffs. Although I indicated to counsel that I was somewhat dismayed at the thickness of the briefs, they were nevertheless most helpful, and I am most appreciative, and I will get the order in so that you can move this case forward, Miss Launer, as I am sure you want to do.

THE CLERK: All rise. This Honorable Court stands in recess.

(Adjourned.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-87-1316

Alfred Muller, M.D.,
FRIENDSHIP HEIGHTS VILLAGE COUNCIL

vs.

J. Joseph CURRAN, JR. Attorney General of the State of Maryland, MONTGOMERY COUNTY COUNCIL, FRIENDSHIP PROPERTIES, THE BARLOW CORPORATION

JUDGMENT

In accordance with the _____ Order dated July 8, 1988 filed in the above entitled case, it is

ORDERED and ADJUDGED: that the motion of plaintiffs for summary judgment is "DENIED", that the motions of defendants for summary judgment are "GRANTED" and judgment be, and the same hereby is, entered in favor of defendants against plaintiffs.

Dated at Baltimore, Maryland this 8th day of July, 1988

JOSEPH A. HAAS
Clerk

by _____
Deputy Clerk

APPENDIX C

Md. Ann. Code Article 23A, §21 (1987 Repl. Vol.) (1989 Cum. Supp.)

Twenty per centum or more of the persons within any particular area in a county who are registered to vote in county elections, together with the owners of not less than twenty-five per centum (25%) of the assessed valuation of the real property of the area to be incorporated, may initiate a proposal to incorporate that area as a municipal corporation, by a petition presented to the board of county commissioners or to the county council of the county. Each person signing the petition shall indicate thereon both his name and residence address and the location and assessed valuation of his property. Upon receiving the petition, the board of county commissioners or county council is directed to verify that any person who signed it is a resident of the particular area and is registered to vote in county elections, and/or is an owner of real property within the area to be incorporated, and shall consider the petition of no effect if it is signed by fewer than twenty per centum of the persons from that area who are registered to vote in county elections, or by persons owning less than twenty-five per centum (25%) of said real property. If the petition complies with the requirements of this section, the board or the council shall by resolution, passed as in its normal legislative procedure, specify the day and the hours for the election at which the question of incorporation shall be submitted to the voters of the particular area, or reject the referendum request within 60 days of the petition requirements having been met. If the board or council rejects the referendum request, the board or council shall provide in writing and make available to the general public the reasons for rejecting the referendum request. The board or council shall establish reasonable procedures by which reconsideration of a referendum request denial can be undertaken, including an opportunity for a public hearing

with sufficient advance public notice. Upon completion of this hearing and review process, the board or council shall, by resolution, affirm its previous action or grant the referendum request.

If the resolution to grant a referendum is approved, there shall be a special election, within a period of not less than forty days nor more than sixty days after the passage of the resolution. In that portion of the resolution which provides for submitting the question of incorporation to the voters of the particular area, the exact wording shall be specified which is to be placed on the ballots or voting machines at the time of the referendum.

The petition when so filed shall then become the property of the board of county commissioners or the county council, and shall not thereafter be used for the purposes of initiating further referenda thereon.

No municipal corporation shall be created under the provisions of this subtitle without the specific approval of the board of county commissioners or of the county council of the county in which the proposed municipal corporation is located.